No. 3112.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF SEATTLE, a municipal corporation,
Plaintiff in Error,

vs.

LLOYDS PLATE GLASS INSURANCE COMPANY, a corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Petition for Re-Hearing

WALTER F. MEIER,
Corporation Counsel,

FRANK S. GRIFFITH,
Assistant Corporation Counsel,
Attorneys for The City of Seattle, Plaintiff in Error.

Post Office Address:
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The plaintiff in error, the City of Seattle, respectfully petitions this court to grant a rehearing in this case upon the following grounds:

That from the opinion it does not appear that the court considered the principle of law which, in our opinion, is controlling in this case, namely:

"Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to secure a perfect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened." This principle has been adopted by the Supreme Court of the State of Washington as the law of that state: First in the *Kitsap County Transportation Co. vs. Seattle,* 75 Wash. Reports, 673, and also in the very recent case of *Fluckiger vs. Seattle,* decided August 7, 1918, and reported in Vol. 3, No. 6, Wash. Decisions, at page 235. See also 4 *Dill. Mun. Cor.* (5th Ed.), Sec. 1627, where the rule is announced; also *Wheeler vs. City of Plymouth,* 18 N. E. 532; *Hines vs. City of Charlotte,* 40 N. W. 333. In *Faulkner vs. City of Aurora,* 44 Am. Reports, 1, it is said:

> "Without seriously complaining of the appellee for having failed to pass a proper ordinance for the prevention of coasting, the appellant seems to rest his right to recover upon its failure to execute the ordinance which it had adopted. Was the appellee liable for such failure? Any one of the appellee's citizens might, under the ordinance, have instituted proceed-

ings against persons coasting on the streets in violation of its provisions. Grant, however, that it was peculiarly the duty of the officers of the appellee to enforce the ordinance and prosecute all persons violating the same, the appellee would not be liable for their failure to discharge this duty. Dillon says, section 754:

" 'Unless there be a valid contract creating, or a statute declaring the liability, a municipal corporation is not bound to provide for and secure a perfect execution of its by-laws, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.'

"* * * If the appellee is liable for the injury thus produced, it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. *To hold incorporated cities liable for such injuries would be unjust, and we think without the sanction of law.*"

In *Schultz vs. City of Milwaukee,* 49 Wis. 254, 35 Am. Rep. 779, it is said:

"The coasting or sluicing down Poplar Street in the manner and to the extent charged in the complaint was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police rather than a corporate duty in the performance of which

> the corporation, as such, has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community."

In *Norristown vs. Fitzpatrick,* 39 Am. Rep. 771, it is said:

> "It is thus apparent from authority, that for the neglect of the police officer, who stood by and permitted the firing of the gun to go on, the borough of Norristown cannot be made liable."

Under the charter provisions and the ordinance regulating the water traffic in Elliott Bay, *the Port Warden is but a police officer.* He is charged as such with the duty of enforcing an ordinance which imposes a penalty upon any one violating its provisions. He fails to enforce the ordinance. Under the authorities above cited and quoted from, for that failure, the municipality cannot be made liable.

Second: The ordinance regulating vessels carrying as cargo or part cargo explosives in any form does not prohibit such vessels from mooring to buoys established by the city and placed in anchorage grounds defined by the city. In the opinion in

Gutowski vs. Mayor, etc., of Baltimore, it is said:
this case it is said by the court, "in the case of

> The same obvious distinction was pointed out by the Supreme Court of Maryland, between such cases of negligence or failure on the part of the municipality, and such a case as is here complained of where the complaint in the case as well as the decision of the court below are based upon the ground that the defendant city, in authorizing and directing, through its Port Warden, this dynamite to be placed and kept at its Buoy No. 1, created a public nuisance in violation of its own ordinance designating another and different place for such purpose."

The provisions of the ordinance permitting vessels carrying power to anchor in the bay and away from the Harrison Street pier are as follows:

> "Every vessel lying at any powder dock or at anchor within Seattle harbor, which has a cargo, or part cargo, of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives, in any form, shall, between sunset and sunrise display * * * a red flag. * * *" (Record, page 55.)

> "Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a *city buoy,* or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew." (Record, page 57.)

These provisions expressly authorize the anchorage of vessels, having on board explosive in any form, in the harbor or to tie up at a buoy. A scow is defined as a vessel by section 2 of the ordinance. (Record, page 50.)

Section 39 does not either imply intention to, or in language change or modify the rights given vessels by the preceding excerpts of Section 38, but clearly recognize the rights afforded by that section. Section 39 provides:

> "The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite and other like explosives, *and as a place* for vessels carrying as cargo, or part cargo, such explosives."

This section does not say that this dock is the only place at which vessels carrying explosives can lie, but simply designates it as a place, carrying the construction placed upon this section by the court in its opinion to its logical conclusion it would in effect repeal all other provisions of the ordinance. It would prohibit the transfer of the explosives from vessel to vessel, a right expressly granted by the ordinance or in any other way handling explosives except at that pier. The impracticability of this was

seen by the legislative body of the city and provision was made in the ordinance for the anchorage of boats carrying powder, not only in the waters of Elliott Bay, but at the buoys established in aid of commerce. The legislative body also took into consideration the patent danger to life and property that would be occasioned by storing large quantities of high explosives on the Harrison Street pier, and therefore denied the right to *store* explosives at said pier, granting only the right to *handle* explosives there. They recognized that it would be necessary to have dynamite on powder boats away from the Harrison Street pier and they provided for such safety by permitting such explosives to be stored on such powder boats within Seattle harbor. Paragraph 4 of Section 38 provides:

> "No person shall on any pier, or other structure except on the powder dock or *on powder boats, within Seattle Harbor,* store * * *."

The legislative body's farsightedness denied the right to *store* powder at the Harrison Street pier, but expressly permitted the storage of dynamite on powder boats within Seattle Harbor. A scow as well as any other kind of boat can be a powder boat. A powder boat is one carrying or loaded with powder.

The construction, in our opinion, placed upon Section 39 of the ordinance would repeal the right to store dynamite on powder boats, a right expressly granted, and at a place other than the Harrison Street pier. We are forced to the conclusion that the rights intended to be given by the terms of the ordinance do not justify the holding of this court that "in authorizing and directing, through its port warden, this dynamite to be placed and kept at Buoy No. 1, created a public nuisance in violation of its own ordinance designating another and different place for such purpose." The city having a right to fix the place or places in Seattle Harbor for the anchorage or mooring of boats carrying dynamite, and having exercised that right by designating several places, cannot be held to have established a nuisance by permitting this dynamite to be anchored at one of those places. The statutes of the State of Washington define what is a public nuisance and what is a private nuisance. Section 8308 of Remington's 1915 Code defines eight things and declares each of them a public nuisance:

> "SEC. 8308. PUBLIC NUISANCES ENUMERATED.—It is a public nuisance:
>
> 1. To cause or suffer the carcass of any animal or any offal, filth or noisome substance to

be collected, deposited or to remain in any place to the prejudice of others;

2. To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake or well, to the injury or prejudice of others;

3. To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water;

4. To obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places;

5. To carry on the business of manufacturing gun-powder, nitro-glycerine or other highly explosive substance, or mixing or grinding the materials therefor, in any building within fifty rods of any valuable building, erected at the time such business may be commenced;

6. To establish powder magazines near incorporated cities or towns, at a point different from that appointed by the corporate authorities of such city or town; or within fifty rods of any occupied dwelling-house;

7. To erect, continue, or use any building, or other place, for the exercise of any trade, employment or manufacture, which, by occasioning obnoxious exhalations, offensive smells or otherwise is offensive or dangerous to the health of individuals or of the public;

> 8. To suffer or maintain on one's own premises, or upon the premises of another, or to permit to be maintained on one's own premises, any place where wines, spirituous, fermented, malt or other intoxicating liquors are kept for sale or disposal to the public in contravertion of law."

None of these defines the anchorage of boats carrying explosives to a buoy as a nuisance.

Section 8309, Remington's 1915 Code, defines "nuisance": "Nuisance consists in *unlawfully* doing an act or omitting to perform a duty which act or omission either annoys, injures, or endangers the comfort, repose, health or safety of others."

Section 8311 of Remington's 1915 Code provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Now, when it is made lawful by the ordinance for the port warden to permit dynamite to be stored on powder boats within Seattle Harbor, under the express enactment of the legislature of Washington, such act cannot be a nuisance. When it permits vessels carrying as cargo or part cargo, explosives in any form to lie at anchor in Seattle Harbor, or at a buoy, and such permission is granted to a vessel, it is under the express authority of the ordinance and cannot be a nuisance. On page nine of the typewritten opinion in this case the court said:

> "We are of the opinion that there is not only nothing in it (the ordinance) authorizing the Port Warden to permit any vessel engaged in transferring dynamite from one vessel to another in the harbor to tie up with it on board to Buoy No. 1."

There is a section of the ordinance which expressly provides for the transfer of dynamite. It is the first paragraph of Section 38, as follows:

> "Every vessel engaged in the transfer of any explosive from one vessel to another within Seattle Harbor, shall come to an absolute stop before beginning such transfer and shall not move its propelling machinery, etc. * * *"

But this has nothing to do with the right granted by the ordinance to moor vessels to buoys or anchor them in the harbor, and if the construction placed on Section 39 by the court is the correct one, explosives could not be transferred from one vessel to another except at the powder dock and would work a repeal of the right to transfer in the open harbor.

Further, anything that is prohibited cannot be regulated; there is nothing to regulate. Hence if the mooring of vessels carrying explosives is prohibited in Seattle Harbor except at the Harrison Street pier, there could be no regulation of such

vessels at any other place. Yet we find that the ordinance, in issue, in terms regulates the anchorage of such vessels and their cargo at buoys and other places in the harbor in the greatest and most explicit detail.

It seems to us after careful and mature consideration, that the opinion of the court places a construction and gives force and power to the language of Section 39 of the ordinance never intended to be given it by the legislative body and one which works a practical repeal of all the other mentioned provisions of said ordinance.

WALTER F. MEIER,
Corporation Counsel,

FRANK S. GRIFFITH,
Assistant Corporation Counsel.
Attorneys for Plaintiff in Error.

We hereby certify that the within petition for rehearing is in our judgment well founded and that it is not interposed for delay.

WALTER F. MEIER,
Corporation Counsel,

FRANK S. GRIFFITH,
Assistant Corporation Counsel.